

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

SEPHRA, LLC, a Nevada limited
liability company,

Plaintiff,

v.

BUFFET ENHANCEMENTS
INTERNATIONAL, INC., an Alabama
corporation,

Defendant.

BUFFET ENHANCEMENTS
INTERNATIONAL, INC., an Alabama
corporation,

Counterclaimant,

v.

SEPHRA, LLC, a Nevada limited
liability company,

Counterdefendant.

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Case No. 06cv2452-BEN (BLM)

**NOTICE AND ORDER FOR EARLY
NEUTRAL EVALUATION CONFERENCE
IN PATENT CASE**

1 **IT IS HEREBY ORDERED** that an Early Neutral Evaluation (ENE) of your
2 case will be held on January 8, 2007 at 1:30 p.m. in the chambers of the
3 Honorable Barbara L. Major, United States Magistrate Judge, 940 Front
4 Street, Suit 5140, San Diego, California 92101.

5 The following are mandatory guidelines for the parties preparing
6 for the Early Neutral Evaluation Conference.

7 1. Purpose of Conference: The purpose of the ENE is to permit
8 an informal discussion between the attorneys, parties, and the
9 settlement judge of every aspect of the lawsuit in an effort to achieve
10 an early resolution of the case. All conference discussions will be
11 informal, off the record, privileged, and confidential. Counsel for any
12 non-English speaking party is responsible for arranging for the
13 appearance of an interpreter at the conference.

14 2. Personal Appearance of Parties Required: All parties,
15 adjusters for insured defendants, and other representatives of a party
16 having full and complete authority to enter into a binding settlement,
17 and the principal attorneys responsible for the litigation, must be
18 present in person and legally and factually prepared to discuss
19 settlement of the case. Counsel appearing without their clients
20 (whether or not counsel has been given settlement authority) will be
21 cause for immediate imposition of sanctions and may also result in the
22 immediate termination of the conference.

23 Unless there are **extraordinary circumstances**, persons required to
24 attend the conference pursuant to this Order shall not be excused from
25 personal attendance. **Requests for excuse from attendance for**
26 **extraordinary circumstances shall be made in writing at least seventy-**
27 **two (72) hours prior to the conference.** Failure to appear at the ENE
28 conference will be grounds for sanctions.

3. **Full Settlement Authority Required:** In addition to counsel who will try the case, a party or party representative with full settlement authority¹ must be present for the conference. In the case of a corporate entity, an authorized representative of the corporation who is not retained outside counsel must be present and must have discretionary authority to commit the company to pay an amount up to the amount of the Plaintiff's prayer (excluding punitive damages prayers). The purpose of this requirement is to have representatives present who can settle the case during the course of the conference without consulting a superior. Counsel for a government entity may be excused from this requirement so long as the government attorney who attends the ENE conference (1) has primary responsibility for handling the case, and (2) may negotiate settlement offers which the attorney is willing to recommend to the government official having ultimate settlement authority.

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¹ "Full settlement authority" means that the individuals at the settlement conference must be authorized to explore settlement options fully and to agree at that time to any settlement terms acceptable to the parties. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 653 (7th Cir. 1989). The person needs to have "unfettered discretion and authority" to change the settlement position of a party. Pitman v. Brinker Int'l, Inc., 216 F.R.D. 481, 485-86 (D. Ariz. 2003). The purpose of requiring a person with unlimited settlement authority to attend the conference contemplates that the person's view of the case may be altered during the face to face conference. Id. at 486. A limited or a sum certain of authority is not adequate. See Nick v. Morgan's Foods, Inc., 270 F.3d 590, 595-97 (8th Cir. 2001).

1 4. **Confidential ENE Statements Required:** No later than five (5)
2 court days prior to the ENE, the parties shall submit confidential
3 statements no more than five (5) pages in length directly to the
4 chambers of the Honorable Barbara L. Major. **These statements shall not**
5 **be filed or served on opposing counsel.** Each party's confidential
6 statement must include the following:

7 a. A brief description of the case, the claims and/or
8 counterclaims asserted, and the applicable defenses or position
9 regarding the asserted claims;

10 b. A specific and current demand or offer for settlement
11 addressing all relief or remedies sought. If a specific demand or offer
12 for settlement cannot be made at the time the brief is submitted, then
13 the reasons therefore must be stated along with a statement as to when
14 the party will be in a position to state a demand or make an offer; and

15 c. A brief description of any previous settlement
16 negotiations, mediation sessions, or mediation efforts.

17 General statements that a party will "negotiate in good faith" is
18 not a specific demand or offer contemplated by this Order. It is
19 assumed that all parties will negotiate in good faith.

20 In addition, parties are encouraged to include in the statement or
21 bring to the ENE appropriate demonstrative aids to assist the court in
22 understanding the invention(s) at issue in the litigation.

23 5. **New Parties Must be Notified by Plaintiff's Counsel:**
24 Plaintiff's counsel shall give notice of the ENE to parties responding
25 to the complaint after the date of this notice.

26 6. **Case Management Under the Amended Federal Rules and the Local**
27 **Patent Rules:** In the event the case does not settle at the ENE, the
28 parties can expect to leave the ENE with Rule 26 compliance dates and

1 deadlines, and a Case Management Order including a Claim Construction
2 briefing schedule and hearing date. Parties shall therefore meet and
3 confer pursuant to Fed. R. Civ. P. 26(f) no later than twenty-one (21)
4 days before the ENE and be prepared to discuss the following matters at
5 the conclusion of the ENE conference:

6 a. Any anticipated objections under Fed. R. Civ. P.
7 26(a)(1)(E) to the initial disclosure provisions of Fed. R. Civ. P.
8 26(a)(1)(A)-(D) and the date of initial disclosures;

9 b. Any proposed modification of the deadlines provided for
10 in the Patent Local Rules, and the effect of any such modification on
11 the date and time of the Claim Construction Hearing, if any;

12 c. Whether the court will hear live testimony at the Claim
13 Construction Hearing;

14 d. The need for and specific limitations on discovery
15 relating to claim construction, including depositions of percipient and
16 expert witnesses;

17 e. The order of presentation at the Claim Construction
18 Hearing; and

19 f. Any proposed modifications to the limitations on
20 discovery imposed under the Federal Rules of Civil Procedure or by local
21 rule.

22 The Court will issue an order following the ENE addressing these
23 issues and setting dates as appropriate.

24 7. Requests to Continue an ENE Conference: Local Patent Rule
25 2.1.a requires that an ENE take place within sixty (60) days of the
26 filing of the first answer. Requests to continue ENEs are rarely
27 granted. However, the Court will consider formal, written *ex parte*
28 requests to continue an ENE conference when extraordinary circumstances

1 exist that make a continuance appropriate. In and of itself, having to
2 travel a long distance to appear in person is not "extraordinary."
3 **Absent extraordinary circumstances, requests for continuances will not**
4 **be considered unless submitted in writing no less than seven (7) days**
5 **prior to the scheduled conference.**

6 Questions regarding this case or the mandatory guidelines set forth
7 herein may be directed to the Magistrate Judge's law clerk at (619) 557-
8 7372.

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10 DATED: November 30, 2006



BARBARA L. MAJOR
United States Magistrate Judge

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16 COPY TO:

17 HONORABLE ROGER T. BENITEZ
18 U.S. DISTRICT JUDGE

19 ALL COUNSEL
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NOTICE OF RIGHT TO CONSENT TO TRIAL
BEFORE A UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of 28 U.S.C. § 636(c), you are hereby notified that a U.S. Magistrate Judge of this district may, upon the consent of all parties, on Form 1A available in the Clerk's Office, conduct any or all proceedings, including a jury or non-jury trial, and order the entry of a final judgment. Counsel for the plaintiff shall be responsible for obtaining the consent of all parties, should they desire to consent.

You should be aware that your decision to consent or not to consent is entirely voluntary and should be communicated solely to the Clerk of Court. Only if all parties consent will the Judge or Magistrate Judge to whom the case has been assigned be informed of your decision.

Judgements of U.S. Magistrate Judges are appealable to the U.S. Court of Appeals in accordance with this statute and the Federal Rules of Appellate Procedure.